

**Letter of Findings: 04-20120696**  
**Gross Retail Tax**  
**For the Years 2009, 2010, and 2011**

**NOTICE:** Under IC § 4-22-7-7, this document is required to be published in the Indiana Register. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's position concerning a specific issue.

**ISSUE**

**I. Penalty – Gross Retail Tax.**

**Authority:** IC § 6-8.1-5-1(c); IC § 6-8.1-10-2.1(a); IC § 6-8.1-10-2.1(d); [45 IAC 15-11-2\(b\)](#); [45 IAC 15-11-2\(c\)](#).

Taxpayer argues that the Department of Revenue should exercise its authority to abate a ten-percent negligence penalty.

**STATEMENT OF FACTS**

Taxpayer is an Indiana business which operates a gas station and convenience store. The Department of Revenue ("Department") conducted a sales and use tax audit of Taxpayer's business records. The audit resulted in the assessment of additional tax along with a "negligence" penalty. Taxpayer disagreed with the penalty and submitted a protest to that effect. Taxpayer was contacted in writing to schedule a hearing during which Taxpayer's representative would be provided an opportunity to explain the basis for the protest. This Letter of Findings has been prepared based upon information provided during the hearing.

**I. Penalty – Gross Retail Tax.**

**DISCUSSION**

Taxpayer presented the audit with a "sales recap" for each month. The recap was attached to monthly sales tax returns. Some sales were marked as "taxable" and some were marked as "exempt." However, "no documentation was provided to show which items [were] sold as taxable or exempt." Because sales employees manually operated the cash registers, "Taxpayer could not determine how employees applied exempt status to items, and did not present a breakdown of taxable goods for employees' reference." The audit also found discrepancies in "inventory cost-of-goods sold as compared to purchase invoices." In reviewing Taxpayer's records of fuel sales, the audit found discrepancies between the amount of fuel purchased from suppliers and the amount of gallons sold. The audit noted that the discrepancies in fuel sales were "greater than the total storage capacity of [T]axpayer's tanks." In addition, the audit found that Taxpayer purchased items such as air conditioning equipment and office supplies without paying sales tax and without self-assessing use tax.

Taxpayer challenges the penalty because he "always complied with the rules [and] regulations [and] filed [and] paid all taxes on time." In addition, Taxpayer explains that he relied on his accountant and manager to properly report the amount of tax due.

The penalty was imposed pursuant to IC § 6-8.1-10-2.1(a) which states:

(a) If a person:

- (1) fails to file a return for any of the listed taxes;
- (2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment;
- (3) incurs, upon examination by the department, a deficiency that is due to negligence;
- (4) fails to timely remit any tax held in trust for the state; or
- (5) is required to make a payment by electronic funds transfer (as defined in [IC 4-8.1-2-7](#)), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department;

the person is subject to a penalty.

IC § 6-8.1-10-2.1(d) states that, "If a person subject to the penalty imposed under this section can show that the failure to... pay the full amount of tax shown on the person's return... or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall waive the penalty."

Departmental regulation [45 IAC 15-11-2\(b\)](#) defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to "be determined on a case-by-case basis according to the facts and circumstances of each taxpayer." Id.

IC § 6-8.1-10-2.1(d) allows the Department to waive the penalty upon a showing that the failure to pay the deficiency was based on "reasonable cause and not due to willful neglect." Departmental regulation [45 IAC 15-11-2\(c\)](#) requires that in order to establish "reasonable cause," the taxpayer must demonstrate that it "exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed...."

Under IC § 6-8.1-5-1(c), "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." An assessment – including the negligence penalty – is

presumptively valid.

Taxpayer is in the business of selling gasoline and convenience store items and has been doing so since 2005; however, Taxpayer's business records were not properly maintained, Taxpayer substantially underreported the amount of tax due and understated the amount of fuel it sold. There is insufficient information to establish that Taxpayer exercised the "ordinary business care and prudence" expected of an "ordinary reasonable taxpayer." [45 IAC 15-11-2](#)(b), (c). Based on a "case-by-case" analysis and after reviewing "the facts and circumstances of each taxpayer" the Department is unable to agree that Taxpayer has met its burden under IC § 6-8.1-5-1(c) of establishing that the ten-percent negligence penalty should be abated.

**FINDING**

Taxpayer's protest is denied.

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